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Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Mark NEWBY,

Plaintiff,

v.

ENRON CORP., et al.,

Defendants.

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C.A. No. H-01-3624
AND CONSOLIDATED CASES

ARTHUR ANDERSEN'S REPLY TO THE *BULLOCK* PLAINTIFFS'
RESPONSE TO ANDERSEN'S MOTION TO STAY DISCOVERY
AND TO ENJOIN FLEMING FROM SEEKING A TEMPORARY
RESTRAINING ORDER IN *BULLOCK*

AND

ARTHUR ANDERSEN'S RESPONSE TO *BULLOCK*'S MOTION TO
QUASH ANDERSEN'S MOTION AND ALTERNATIVE MOTION
TO DELAY CONSIDERATION AND OF ANDERSEN'S MOTIONS¹

AND

ARTHUR ANDERSEN'S SUPPLEMENTAL MOTION TO ENJOIN
FLEMING FROM SEEKING UNSPECIFIED RELIEF IN RESPONSE
TO DEFENDANTS' PROPERLY FILED MOTIONS IN THIS COURT

1. On April, 17, 2002, Arthur Andersen LLP ("Andersen") and individual Andersen partners filed an emergency motion asking this Court to exercise its powers under the Securities Litigation Uniform Standards Act ("SLUSA") and the All-Writs Act to stay discovery in a case captioned Bullock v. Arthur Andersen, LLP, No. 32,716 (21st Judicial District Court, Washington County, Tex.) ("Bullock") and to further enjoin Fleming & Associates and the Bullock plaintiffs (sometimes collectively referred to as "Fleming") from seeking a temporary injunction that is duplicative of an injunction already issued by this Court in January 2002 requiring Andersen to preserve documents and would directly interfere with the motions of the

¹ On April 24, 2002, this Court issued an order stating that the Court would rule on Andersen's motion on April 29, thus mooted Fleming's Alternative Motion to Delay.

560

Regents of the University of California (the “Regents”) and American National Insurance Company (“American National”) regarding the disposition of Andersen assets.²

2. On April 18, 2002, this Court entered an order giving Fleming and the Bullock plaintiffs until noon on April 24, 2002 to respond to Andersen’s motion. On April 19, 2002 Fleming filed a document denominated as a “Motion to Quash Andersen’s Motion or in the Alternative Motion to Delay Consideration of Andersen’s Motion.” (“Bullock Motion”). However, because Fleming never complied with its obligation to confer with the parties, the Bullock Motion cannot be treated as a motion for affirmative relief.³ To the extent this Court treats the Bullock Motion as a response to Andersen’s motion, Andersen responds herein and now submits this reply both in further support of its motion and in response to Fleming’s submission. Andersen also now responds to the Response to Motion of Andrew S. Fastow to Enjoin Other Washington County Residents From Seeking Relief in State Court in their Home County (“Bullock Response”).

ARGUMENT

I. ANDERSEN’S REQUEST FOR EMERGENCY RELIEF IS PROPER PURSUANT TO LOCAL R. 7.8

3. As a preliminary matter, Fleming challenges Andersen’s request for emergency relief by asserting that Andersen has known since late March that a hearing would be held on May 3 with respect to the issues now scheduled for hearing. See Bullock Motion at ¶ 1. Fleming’s statement is false.

² Andersen’s motion applies as well to Fleming’s and the Bullock plaintiffs’ efforts to interfere with the individual Andersen partners’ personal assets. As indicated in the joinder filed by Ken Lay, Fleming and the Bullock plaintiffs are using their motion for individual injunctions as a vehicle to seek prohibited discovery.

³ See S.D. Tex. Local R. 7.1(D) (“opposed motions shall . . . contain an averment that (1) the movant has conferred with the respondent and (2) counsel cannot agree about the disposition of the motion”).

4. At no time in March 2002 (nor at any time prior), did Fleming make Andersen aware that May 3 was the scheduled date for a temporary injunction hearing. See Declaration of Andrew Ramzel (“Ramzel Dec.”) at ¶¶ 8-13. And, indeed, until April 16, 2002, no such hearing had been scheduled for May 3. The possibility of a temporary injunction hearing with respect to Messrs. Lay, Fastow and Skilling was first mentioned by Fleming at a March 28, 2002 status conference before Judge Flenniken in the 21st Judicial District Court of Washington County, Texas. Ramzel Dec. at ¶¶ 7-9. In discussing a possible temporary injunction hearing, the focus was on the fact that those three individuals had not yet been served. Ramzel Dec. at ¶ 9, Ex. A. No reference was made to Andersen and no hearing date was set. Ramzel Dec. at ¶¶ 9-10.⁴

5. On March 29, 2002, Fleming sent a letter to counsel for Andersen regarding Fleming’s interest in beginning discovery. Ramzel Dec. Ex. B. This letter did not state that a hearing for a temporary injunction involving Andersen had been scheduled. On April 11, 2002, Plaintiff filed Plaintiffs’ First Amended Petition and Application for Temporary and Permanent Injunction (“Amended Petition”), in which Fleming seeks, among other things, a temporary injunction against Andersen relating to document destruction, seeks an injunction modeled after those injunctions sought by the Regents and by American National, and seeks injunctive relief directed against the individual Andersen partner defendants. This Amended Petition was served with a cover letter indicating that the Bullock plaintiffs’ application for a temporary injunction would be heard on May 16, 2002. See Ramzel Dec. at ¶ 13, Ex. C.

⁴ In addition, Fleming’s allegation that “Andersen did not object to the discovery schedule [during the March 28 status conference] or to the fact that a hearing on the injunction would be scheduled” completely mischaracterizes Andersen’s response. See Ramzel Dec. at ¶ 11. During the status conference, Andersen specifically informed the judge that this Court had the statutory authority under SLUSA to stay discovery in the Bullock case if the discovery was disruptive to the federal proceedings. See id. Moreover, because Andersen was not mentioned as a possible target of the injunction hearing, no objection was appropriate. See id.

6. Before Andersen had filed its motion to stay discovery and enjoin the hearing scheduled for May 16 (which did not need to be heard on an emergency basis), Fleming, in a letter dated April 16, 2002, for the first time notified Andersen that the date for the temporary injunction hearing had been moved to May 3, 2002, Ramzel Dec. ¶ 15, Ex. D,⁵ thus creating the emergency that necessitated Andersen's proper request that its motion be considered on a shortened scheduled.⁶

7. On April 23, 2002, in response to the motions filed and/or joined by Andersen and the individual defendants Fleming filed in state court a Notice of Defendants' Actions Taken in Derogation of This Court's Jurisdiction, objecting to the motions properly filed in this Court seeking injunctive relief. Fleming states that it and the Bullock plaintiffs

are at a loss as to the form of relief they should seek to remedy Defendants' actions. Therefore, they respectfully request that the Court take any action it deems appropriate under the circumstances.

Ramzel Dec., Ex. E.

II. SUBJECT MATTER JURISDICTION OVER THE
STATE COURT ACTION IS NOT REQUIRED IN
ORDER TO STAY DISCOVERY UNDER SLUSA

8. Fleming incorrectly argues that this Court must have subject matter jurisdiction over the Bullock case in order to exercise its authority under SLUSA and the All Writs Act to stay discovery and enjoin Fleming from proceeding with the temporary injunction application. However, this Court's power to grant the relief requested by Andersen is grounded in federal law and this Court's jurisdiction over the case before it. SLUSA does not require that a federal court

⁵ In a document entitled Notice of Defendants' Actions Taken in Derogation of this Court's Jurisdiction, filed by Fleming on April 23, 2002 in the Bullock case in state court, Fleming expressly acknowledges that the May 3 hearing date was first set on April 11, not in March. Ramzel Dec. Ex. E.

⁶ Under S.D. Tex. Local R. 7.3, had Andersen submitted its motion without seeking emergency relief, the motion would have become moot before the Court had the opportunity to consider it. See Ramzel Dec. at ¶ 16.

have jurisdiction over the state court action in which discovery is being sought in order to issue a stay of discovery in that state court action. See 15 U.S.C. 77z-1(b)(4), 78u-4(b)(3)(D). It is totally irrelevant whether the Court has subject matter jurisdiction over the Bullock case or whether that case is a class action or an individual action.⁷

SLUSA, on its face, grants federal courts the authority to stay discovery proceedings

in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

See id. (emphasis added). Nowhere does SLUSA require that a federal court have an independent basis for subject matter jurisdiction over the state court action in order to issue a stay of discovery. To impose such a requirement would violate a fundamental principle of statutory construction – giving meaning to every word used by Congress and avoiding an interpretation that would render some language superfluous. See United States v. North American Construction Corp., 173 F. Supp. 2d 601, 623 (S.D. Tex. 2001) (citing Bailey v. United States, 516 U.S. 137, 145 (1995)). Moreover, such a requirement would be contrary to the underlying purpose for enacting SLUSA, which was to “give Federal judges tools to combat abuse of discovery proceedings in individual actions that may be brought in State court.” H.R. Rep. No. 640, 105th Cong., 2nd Sess. 1998, 1998 WL 414917, at *10-11 (1998) (emphasis added).⁸ See also In re BankAmerica Corp. Sec. Litig., 263 F.3d 795, 802 (8th Cir. 2001) (the

⁷ Andersen’s position remains that the Fleming cases constitute a covered class action under SLUSA and that Fleming’s efforts to evade SLUSA by dividing his plaintiffs into numerous virtually identical actions filed in different courts is an improper manipulation of the judicial process. However, as explained above, this Court need not resolve whether all of Fleming’s cases constitute a covered class action under SLUSA before it exercises its independent authority under SLUSA to stay state court discovery.

⁸ In a recent decision, Lapicola v. Alternative Dual Fuels, Inc., 2002 WL 531545 (N.D. Tex. Apr. 5, 2002), the Northern District of Texas declined to decide whether the stay provision applied to private individual lawsuits. Instead, the Northern District refused to issue such a stay because there was no showing that the stay was warranted. See Id. at *1. Unlike Lapicola, a stay of discovery in this case is warranted because discovery would place an unreasonable burden on the defendants given the aggressive case management schedule set by this Court in the (...continued)

automatic stay provision “is aimed at plaintiffs who would use state-court action to circumvent the automatic discovery stay that applies in federal actions”) (emphasis added).

9. Where, as here, plaintiffs or their attorneys seek discovery in state court that is barred in federal court by the PSLRA, SLUSA authorizes federal courts to stay discovery in those state court proceedings. See H.R. Rep., 1998 WL 414917 at *18 (“the Committee intends that courts use [the SLUSA discovery stay] provision liberally, so that preservation of State Court jurisdiction of limited individual securities fraud claims does not become the loophole through which the trial bar can engage in discovery not subject to the stay of the Reform Act”) (emphasis added).

10. The Fleming law firm currently represents plaintiffs in five actions relating to the collapse of Enron pending before this Court as part of the consolidated Newby action. All of these cases are subject to the automatic stay under the PSLRA: Ahlich v. Arthur Andersen LLP, No. 02-0347, Odam v. Enron Corp., No. 01-3914; Pearson v. Fastow, No. H-02-0670; Rosen v. Fastow, No. 02-0199, and Delgado v. Fastow, No. H-02-3624. Furthermore, two of the plaintiffs in the Bullock action are also plaintiffs in the Odam action, Hal Moorman and Milton Tate, Co-Trustees for Moorman, Tate, Moorman & Urquhart Money Purchase Plan & Trust. There can be no question that Fleming and the Bullock plaintiffs are trying to get around the PSLRA stay by proceeding with discovery in Bullock.⁹ Fleming could have but refused to agree to a schedule

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Newby action and the sheer volume of materials requested by the Bullock plaintiffs. See Ramzel Declaration dated April 17, 2002, Ex. C.

⁹ In addition to the discovery requests set forth in the Ramzel Declaration in support of Andersen’s motion, on April 17, 2002, Fleming also issued and sent a subpoena to LJM2 Capital Management requesting:

Any and all records in your possession or under your control related to LJM Cayman L.P., LJM Partners L.P., LJM Swap Sub, L.P., Big Doe L.L.C., LJM Swap Co., LJM2 Co-Investment L.P., Southampton Place L.L.P. and LJM Partnership.

(...continued)

that would allow coordination between discovery in this Court and in the state court. He cannot now be permitted to rely upon the state court trial schedule to seek discovery. Nor can he rely on a superficial factual allegation regarding Ken Lay's purported statement in Washington County in order to justify the immediate and uncoordinated pursuit of discovery in state court. Bullock involves virtually all of the factual and legal issues presented in the consolidated class actions currently before this Court. With respect to Andersen, for example, Fleming Alleges:

the Andersen Defendants, as Enron's independent auditor, miserably failed investors in performing its obligations The Andersen Defendants thus knew or recklessly disregarded Enron's actual financial condition and business problems, which were concealed from the investing public. AALP however, issued unqualified, misleading and false reports regarding Enron's finances for the periods of 1997, 1998, 1999 and 2000.

Amended Petition at ¶¶ 72-73. Because Fleming seeks to use the Bullock action to elude the PSLRA stay in the consolidated federal cases, this Court should exercise its authority under SLUSA and stay discovery in Bullock.

II. JURISDICTION OVER THE STATE COURT ACTION
IS NOT REQUIRED TO STAY THE PROCEEDINGS OR
ENJOIN A PARTY TO THE STATE ACTION UNDER
THE ALL WRITS AND ANTI-INJUNCTION ACTS

11. Fleming also argues that because the All Writs Act and the Anti-Injunction Act cannot serve as independent sources of subject matter jurisdiction, this Court does not possess the authority to stay the discovery in Bullock or enjoin Fleming from seeking a temporary injunction in that case. Once again, Fleming's argument is specious. The All Writs Act does not require that a federal court have subject matter jurisdiction over a state court action in order to issue an injunction. See In re BankAmerica, 95 F. Supp. 2d 1044, 1048 (E.D. Mo. 2000), aff'd

(continued...)

See LJM Cayman, L.P., Chewco Investments, L.P., and Michael J. Kopper's Response and Joinder in Motions to Stay Discovery and Exhibit B thereto.

263 F.3d 797 (8th Cir. 2001); see also In re Lease Oil, 48 F. Supp. 2d 699, 704 (S.D. Tex. 1998) (recognizing that when the All Writs Act “authorizes protective action, a court may enjoin not only parties to the action, but non-parties as well”). All that is required for an All Writs Act injunction is that the state action so interferes “with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.” Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 299 (1970). None of the cases cited by Fleming are to the contrary; in fact, the cases cited by Fleming support Andersen’s position. See United States v. New York Tel., 434 U.S. 159, 174 (1977))(the “power conferred by the [All Writs Act] extends, under appropriate circumstances, to persons who though not parties to the original action . . . are in a position to frustrate the implementation of a court order or the proper administration of justice); ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978) (finding that the All Writs Act can be used to “curb conduct which threatened improperly to impede or defeat the subject matter jurisdiction then being exercised by the court”).¹⁰

12. Here, it is the Court’s jurisdiction over the consolidated Newby cases that Fleming’s actions threaten to impede. It is this Court’s jurisdiction over the Newby action that entitles it to enjoin discovery and the temporary restraining order proceeding in Bullock. See In re Lease Oil Antitrust Litig., 48 F. Supp. 2d 699, 704 (S.D. Tex. 1998). See also Carlough v. Amchem Prod. Inc., 10 F.3d 189, 201 (3d Cir. 1993) (subject matter jurisdiction over the federal action is required before injunctions can be issued pursuant to the All Writs Act and Anti-

¹⁰ Regions Bank of La. v. Rivet, 224 F.3d 483 (5th Cir. 2000), also relied on by Fleming, arises in a different context because in that case, unlike here, there was no pending action before the federal court. Here, because the Court is protecting jurisdiction it is currently exercising over the Newby litigation, Regions Bank is inapposite.

Injunction Act); In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985)(jurisdiction required over the “case in chief” prior to issuing injunctive relief under the All Writs Act).

13. Furthermore, this Court has authority over the parties to the federal litigation over which it has personal jurisdiction. See In re Lease Oil Antitrust Litigation, 48 F. Supp. 2d at 704-05; see also In re General Motors Corp., 134 F.3d 133 (3d Cir. 1998); Hilman v. Webley, 115 F.3d 1461 (10th Cir. 1997) (federal court “undoubtedly had the authority under the All Writs Act to enjoin parties before it from pursuing conflicting litigation in the state court”). In In re Lease Oil, this Court specifically held that it had the authority under the All Writs Act to enjoin named parties over whom it exercised personal jurisdiction from pursuing state court actions. 48 F. Supp. 2d at 704-07. Two of the Bullock plaintiffs, Moorman and Tate, are squarely before this Court as plaintiffs in the Odam action, consolidated in Newby. Moreover, as the Court is well aware Fleming is counsel in that action, which was filed in this Court on or about November 18, 2001, as well as four other actions pending before the Court. Thus, this Court unquestionably possesses the authority to enjoin them, and their representatives, or persons acting in concert with them, from pursuing state court actions which impede this Court’s ability to control this multidistrict litigation.

14. Fleming also objects to the injunction sought by Andersen on the grounds that it will “restrain an in personam state action involving the same subject matter from going on at the same time as the federal action.” Motion to Quash at ¶ 9. Fleming is incorrect. Federal courts have invoked their authority under the All Writs Act and Anti-Injunction Act in complex multidistrict litigation where, as here, parties to federal court litigation, or their attorneys, have attempted to use the state courts to undermine the federal court’s ability to control the

proceedings properly before it.¹¹ See e.g., Winkler, 101 F.3d at 1202 (enjoining MDL litigants from obtaining discovery in state court); Carlough, 10 F.3d at 197; In re Baldwin, 770 F.2d at 336. See also In re Columbia Healthcare Corp., 93 F. Supp. 2d 876, 880-81 (M.D. Tenn. 2000) (enjoining state court plaintiffs not a party to the MDL from obtaining discovery in state court where the state court plaintiffs and MDL plaintiffs agreed to share information obtained in discovery). Jurisdiction is often invoked in Complex Multidistrict Litigation that is the “virtual equivalent of a res.” Battle v. Liberty Nat’l Life Ins. Co., 877 F.2d 877, 882 (11th Cir. 1989) (quoting In re Baldwin, 770 F.2d at 337). See Winkler, 101 F.3d 1196 at 1202 (finding that the power to control multidistrict litigation, as established by 28 U.S.C. § 1407, included the ability to “prevent predatory discovery, especially of sensitive documents, ensuring that litigants use discovery properly as an evidence gathering tool, and not as a weapon”). “Indeed, an express purpose of consolidating multidistrict litigation for discovery is to conserve judicial resources by avoiding duplicative rulings.” Id. Thus, this Court may stay discovery in Bullock and enjoin Fleming from seeking a temporary injunction in order to protect this Court’s ability to control the multidistrict Enron-related litigation.

15. Moreover, Fleming’s application for a temporary restraining order follows by more than three months this Court’s entry of an order in January regarding Andersen’s obligations to preserve documents effectively placing those documents within the control of this Court. Fleming’s application can serve no conceivable purpose but to interfere with this Court’s comprehensive order. Fleming’s application also comes upon the heels of virtually identical motions filed by the Regents and American National concerning their efforts to vest this Court

¹¹ As the Court is aware, on April 16, 2002, the Judicial Panel on Multidistrict Litigation issued an order centralizing in this Court 54 Enron-related federal civil case and noting that at least 40 or more cases have been designated as tag along cases that will be subject to conditional transfer orders.

with control over Andersen's assets and can only interfere with this Court's ability to address the issues before it relating to those motions. Cf. James v. Belloti, 773 F.2d 989, 993 (1st Cir. 1989) (finding that no state court purporting to exercise in personam jurisdiction could interfere with the federal court's previously obtained in rem jurisdiction over the property); Cayuga v. Fox, 544 F. Supp. 542, 550 (N.D.N.Y. 1982) (federal court entitled to exercise jurisdiction over the res "to the exclusion of other courts" when the federal court obtains jurisdiction first, citing Donovan v. City of Dallas, 377 U.S. 408 (1964)).

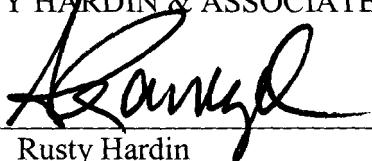
16. Andersen's actions in asking this court it exercise its powers to protect its jurisdiction over the matters before it is proper. Fleming's effort to obtain unspecified relief in order to prevent Andersen and the other Defendants from pursuing lawful and appropriate remedies, see Ramzel Dec. Ex. E, is further evidence of Flemings improper interference with this Court's exercised of its jurisdiction in these cases.

CONCLUSION

17. For the foregoing reasons, the Court should grant Defendant Arthur Andersen's LLP motion to stay discovery and to enjoin Fleming and the Bullock plaintiffs from seeking a temporary injunction in the Bullock case, deny Bullock's motion to quash Andersen's motion and alternative motion to delay consideration of Andersen's motion, and award such other relief as this Court may deem just and proper. To the extent that the Court treats the Bullock Motion as a timely and properly filed motion, it should be denied in its entirety. Finally, the Court should require Fleming to withdraw its Notice, including its request for unspecified relief from the state court, filed in response to Defendants' properly filed motions in this Court.

Dated: Houston, Texas
April 26, 2002

Respectfully Submitted,
RUSTY HARDIN & ASSOCIATES, P.C.

By: 

Rusty Hardin
State Bar No. 08972800
S.D. Tex. I.D. No. 19424
1201 Louisiana, Suite 3300
Houston, Texas 77002
(713) 652-9000
(713) 652-9800 (fax)

Attorney-in-Charge for
Defendant Arthur Andersen LLP

OF COUNSEL

Andrew Ramzel
State Bar No. 00784184
S.D. Tex. I.D. No. 18269
RUSTY HARDIN & ASSOCIATES, P.C.

Daniel Kolb
Michael P. Carroll
Sharon Katz
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-3633 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of April, 2002, the foregoing pleading was served pursuant to the Court's April 5, 2002 Order.



Andrew Ramzel